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Done at Washington, DC, on December 9, 2008.

Alfred V. Almanza,
Administrator.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9434]

RIN 1545-BC88

Creditor Continuity of Interest

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations providing guidance regarding when and to what extent creditors of a corporation will be treated as proprietors of the corporation in determining whether continuity of interest ("COI") is preserved in a potential reorganization. These final regulations are necessary to provide clarity to parties engaging in reorganizations of insolvent corporations, both inside and outside of bankruptcy. These final regulations affect corporations, their creditors, and their shareholders.

DATES: *Effective Date:* These final regulations are effective on December 12, 2008.

Applicability Date: For dates of applicability see § 1.368-1(e)(8).

FOR FURTHER INFORMATION CONTACT: Jean Brenner (202) 622-7790, Douglas Bates (202) 622-7550, or Bruce Decker (202) 622-7550 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

On March 10, 2005, the IRS and Treasury Department published a notice of proposed rulemaking (REG-163314-

03) in the **Federal Register** (70 FR 11903) proposing regulations that would provide guidance regarding the application of the nonrecognition rules of subchapter C of the Internal Revenue Code (Code) to transactions involving insolvent corporations and to other transactions that raise similar issues. No public hearing regarding the proposed regulations was requested or held. The IRS and Treasury Department have carefully considered the comments regarding the proposed regulations. The IRS and Treasury Department continue to consider the issues raised and to evaluate the complexity and necessity for valuation under the exchange of net value requirement. In the interim, these final regulations adopt the portion of the proposed regulations that deals with the circumstances in which (and the extent to which) creditors of a corporation will be treated as proprietors of the corporation in determining whether continuity of interest is preserved in a potential reorganization.

Explanation of Provisions

These final regulations provide that, in certain circumstances, stock received by creditors may count for continuity of interest purposes both inside and outside of bankruptcy proceedings. The expansion of the application of the G reorganization rules to reorganizations of insolvent corporations outside of bankruptcy is consistent with Congress' intent to facilitate the rehabilitation of troubled corporations. S. Rep. No. 96-1035, 96th Sess. 35 (1980). Accordingly, the final regulations adopt the rules proposed for creditors of an insolvent target corporation outside of a title 11 or similar case in new § 1.368-1(e)(6) with only minor modifications and clarifications. The final regulations treat claims of the most senior class of creditors to receive a proprietary interest in the issuing corporation and claims of all equal classes of creditors (together, the senior claims) differently from the claims of classes of creditors junior to the senior claims (the junior claims). The final regulations treat such senior claims as representing proprietary interests in the target corporation. While such senior claims, and all junior claims, are treated as representing a proprietary interest in the target corporation, the determination of the value of proprietary interests in the target corporation represented by the senior claims is made by calculating the average treatment for all senior claims. The final regulations provide that the value of a proprietary interest in the target corporation represented by a senior claim is determined by multiplying the fair market value of the

creditor's claim by a fraction, the numerator of which is the fair market value of the proprietary interests in the issuing corporation that are received in the aggregate in exchange for the senior claims, and the denominator of which is the sum of the amount of money and the fair market value of all other consideration (including the proprietary interests in the issuing corporation) received in the aggregate in exchange for such claims. In contrast to the treatment of the senior creditor class that receives stock of the issuing corporation, the value of the proprietary interest in the target corporation represented by a junior claim is the fair market value of the junior claim. The effect of this rule is that there is 100 percent continuity of interest if each senior claim is satisfied with the same ratio of stock to nonstock consideration and no junior claim is satisfied with nonstock consideration.

An example was added to the COI rule in response to a suggestion that the final regulations demonstrate the bifurcation of senior claims when the creditors of the class receive disproportionate amounts of acquiring corporation stock and other property. Also, in response to comments, a rule was added to the final regulations requiring that in the situation where there is only one class of creditors receiving stock, more than a de minimis amount of acquiring corporation stock must be exchanged for the creditors' proprietary interests relative to the total consideration received by the insolvent target corporation, its shareholders, and its creditors, before the stock will be counted for purposes of COI.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these final regulations and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these regulations are Jean Brenner, Douglas Bates, and Bruce Decker of the Office of

Associate Chief Counsel (Corporate). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.368-1 is amended by:

- 1. Adding a sentence after the fifth sentence of paragraph (e)(1)(i).
- 2. Adding a sentence at the end of paragraph (e)(1)(ii).
- 3. Revising paragraph (e)(3).
- 4. Redesignating paragraphs (e)(6), (e)(7), and (e)(8) as paragraphs (e)(7), (e)(8), and (e)(9) respectively, and adding a new paragraph (e)(6).
- 5. Adding *Example 10* to the end of newly designated paragraph (e)(8).
- 6. Adding a sentence at the end of newly designated paragraph (e)(9)(i).

The additions and revisions read as follows:

§ 1.368-1 Purpose and scope of exception to reorganization exchanges.

* * * * *

(e) * * *

(1) * * *

(i) * * * See paragraph (e)(6) of this section for rules related to when a creditor's claim against a target corporation is a proprietary interest in the corporation. * * *

(ii) * * * A proprietary interest in the target corporation is not preserved to the extent that creditors (or former creditors) of the target corporation that own a proprietary interest in the corporation under paragraph (e)(6) of this section (or would be so treated if they had received the consideration in the potential reorganization) receive payment for the claim prior to the potential reorganization and such payment would be treated as other property or money received in the exchange for purposes of section 356 had it been a distribution with respect to stock.

(3) *Related persons acquisitions.* A proprietary interest in the target corporation is not preserved if, in connection with a potential reorganization, a person related (as

defined in paragraph (e)(4) of this section) to the issuing corporation acquires, for consideration other than stock of the issuing corporation, either a proprietary interest in the target corporation or stock of the issuing corporation that was furnished in exchange for a proprietary interest in the target corporation. The preceding sentence does not apply to the extent those persons who were the direct or indirect owners of the target corporation prior to the potential reorganization maintain a direct or indirect proprietary interest in the issuing corporation.

* * * * *

(6) *Creditors' claims as proprietary interests*—(i) *In general.* A creditor's claim against a target corporation may be a proprietary interest in the target corporation if the target corporation is in a title 11 or similar case (as defined in section 368(a)(3)) or the amount of the target corporation's liabilities exceeds the fair market value of its assets immediately prior to the potential reorganization. In such cases, if any creditor receives a proprietary interest in the issuing corporation in exchange for its claim, every claim of that class of creditors and every claim of all equal and junior classes of creditors (in addition to the claims of shareholders) is a proprietary interest in the target corporation immediately prior to the potential reorganization to the extent provided in paragraph (e)(6)(ii) of this section.

(ii) *Value of proprietary interest*—(A) *Claims of most senior class of creditors receiving stock.* A claim of the most senior class of creditors receiving a proprietary interest in the issuing corporation and a claim of any equal class of creditors will be treated as a proprietary interest in accordance with the rules of this paragraph (e)(6)(ii). For a claim of the most senior class of creditors receiving a proprietary interest in the issuing corporation, and a claim of any equal class of creditors, the value of the proprietary interest in the target corporation represented by the claim is determined by multiplying the fair market value of the claim by a fraction, the numerator of which is the fair market value of the proprietary interests in the issuing corporation that are received in the aggregate in exchange for the claims of those classes of creditors, and the denominator of which is the sum of the amount of money and the fair market value of all other consideration (including the proprietary interests in the issuing corporation) received in the aggregate in exchange for such claims. If only one class (or one set of equal classes) of creditors receives

stock, such class (or set of equal classes) is treated as the most senior class of creditors receiving stock. When only one class (or one set of equal classes) of creditors receives issuing corporation stock in exchange for a creditor's proprietary interest in the target corporation, such stock will be counted for measuring continuity of interest provided that the stock issued by the acquiring corporation is not de minimis in relation to the total consideration received by the insolvent target corporation, its shareholders, and its creditors.

(B) *Claims of junior classes of creditor receiving stock.* The value of a proprietary interest in the target corporation held by a creditor whose claim is junior to the claims of other classes of target claims which are receiving proprietary interests in the issuing corporation is the fair market value of the junior creditor's claim.

(iii) *Bifurcated claims.* If a creditor's claim is bifurcated into a secured claim and an unsecured claim pursuant to an order in a title 11 or similar case (as defined in section 368(a)(3)) or pursuant to an agreement between the creditor and the debtor, the bifurcation of the claim and the allocation of consideration to each of the resulting claims will be respected in applying the rules of this paragraph (e)(6).

(iv) *Effect of treating creditors as proprietors.* The treatment of a creditor's claim as a proprietary interest in the target corporation shall not preclude treating shares of the target corporation as proprietary interests in the target corporation.

* * * * *

(8) * * *

Example 10. Creditors treated as owning a proprietary interest. (i) *More than one class of creditor receives issuing corporation stock.* T has assets with a fair market value of \$150x and liabilities of \$200x. T has two classes of creditors: two senior creditors with claims of \$25x each; and one junior creditor with a claim of \$150x. T transfers all of its assets to P in exchange for \$95x in cash and shares of P stock with a fair market value of \$55x. Each T senior creditor receives \$20x in cash and P stock with a fair market value of \$5x in exchange for his claim. The T junior creditor receives \$55x in cash and P stock with a fair market value of \$45x in exchange for his claim. The T shareholders receive no consideration in exchange for their T stock. Under paragraph (e)(6) of this section, because the amount of T's liabilities exceeds the fair market value of its assets immediately prior to the potential reorganization, the claims of the creditors of T may be proprietary interests in T. Because the senior creditors receive proprietary interests in P in the transaction in exchange for their claims, their claims and the claim of the junior creditor and the T stock are

treated as proprietary interests in T immediately prior to the transaction. Under paragraph (e)(6)(ii)(A) of this section, the value of the proprietary interest of each of the senior creditors' claims is \$5x (the fair market value of the senior creditor's claim, \$25x, multiplied by a fraction, the numerator of which is \$10x, the fair market value of the proprietary interests in the issuing corporation, P, received in the aggregate in exchange for the claims of all the creditors in the senior class, and the denominator of which is \$50x, the sum of the amount of money and the fair market value of all other consideration (including the proprietary interests in P) received in the aggregate in exchange for such claims). Accordingly, \$5x of the stock that each of the senior creditors receives is counted in measuring continuity of interest. Under paragraph (e)(6)(ii)(B) of this section, the value of the junior creditor's proprietary interest in T immediately prior to the transaction is \$100x, the value of his claim. Thus, the value of the creditors' proprietary interests in total is \$110x and the creditors received \$55x worth of P stock in total in exchange for their proprietary interests. Therefore, P acquired 50 percent of the value of the proprietary interests in T in exchange for P stock. Because a substantial part of the value of the proprietary interests in T is preserved, the continuity of interest requirement is satisfied.

(ii) *One class of creditor receives issuing corporation stock and cash in disproportionate amounts.* T has assets with a fair market value of \$80x and liabilities of \$200x. T has one class of creditor with two creditors, A and B, each having a claim of \$100x. T transfers all of its assets to P for \$60x in cash and shares of P stock with a fair market value of \$20x. A receives \$40x in cash in exchange for its claim. B receives \$20x in cash and P stock with a fair market value of \$20x in exchange for its claim. The T shareholders receive no consideration in exchange for their T stock. The P stock is not de minimis in relation to the total consideration received. Under paragraph (e)(6) of this section, because the amount of T's liabilities exceeds the fair market value of its assets immediately prior to the potential reorganization, the claims of the creditors of T may be proprietary interests in T. Because the creditors of T received proprietary interests in P in the transaction in exchange for their claims, their claims and the T stock are treated as proprietary interests in T immediately prior to the transaction. Under paragraph (e)(6)(ii)(A) of this section, the value of the proprietary interest of each of the senior creditors is \$10x (the fair market value of a senior creditor's claim, \$40x, multiplied by a fraction, the numerator of which is \$20x, the fair market value of the proprietary interests in the issuing corporation, P, received in the aggregate in exchange for the claims of all the creditors in the class, and the denominator of which is \$80x, the sum of the amount of money and the fair market value of all other consideration (including the proprietary interests in P) received in the aggregate in exchange for such claims). Accordingly, \$10x of the cash that was received by A and \$10x of the P stock that was received by B are counted in measuring

continuity of interest. Thus, the value of the creditors' proprietary interests in total is \$20x and the creditors received \$10x worth of P stock in total in exchange for their proprietary interests. Therefore, P acquired 50 percent of the value of the proprietary interests in T in exchange for P stock. Because a substantial part of the value of the proprietary interests in T is preserved, the continuity of interest requirement is satisfied.

(9) * * * The sixth sentence of paragraph (e)(1)(i) of this section, the last sentence of paragraph (e)(1)(ii) of this section, paragraph (e)(3) of this section, paragraph (e)(6) of this section, and *Example 10* of paragraph (e)(8) of this section apply to transactions occurring after December 12, 2008.

Linda E. Stiff,
Deputy Commissioner for Services and Enforcement.

Approved: December 3, 2008.

Eric Solomon,
Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. E8-29271 Filed 12-11-08; 8:45 am]

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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910, 1915, 1917, 1918 and 1926

[Docket No. OSHA-2008-0031]

RIN 1218-AC42

Clarification of Employer Duty To Provide Personal Protective Equipment and Train Each Employee

AGENCY: Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

ACTION: Final rule.

SUMMARY: In this rulemaking, OSHA is amending its standards to add language clarifying that the personal protective equipment (PPE) and training requirements impose a compliance duty to each and every employee covered by the standards and that noncompliance may expose the employer to liability on a per-employee basis. The amendments consist of new paragraphs added to the introductory sections of the listed Parts and changes to the language of some existing respirator and training requirements. This action, which is in accord with OSHA's longstanding position, is being taken in response to recent decisions of the Occupational Safety and Health Review Commission indicating that differences in wording among the various PPE and training

provisions in OSHA safety and health standards affect the Agency's ability to treat an employer's failure to provide PPE or training to each covered employee as a separate violation. The amendments add no new compliance obligations. Employers are not required to provide any new type of PPE or training, to provide PPE or training to any employee not already covered by the existing requirements, or to provide PPE or training in a different manner than that already required. The amendments simply clarify that the standards apply to each employee.

DATES: This final rule becomes effective on January 12, 2009.

ADDRESSES: In accordance with 28 U.S.C. 2112(a), the Agency designates Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health, Office of the Solicitor of Labor, Room S-4004, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, to receive petitions for review of the final rule.

FOR FURTHER INFORMATION CONTACT:

Contact Ms. Jennifer Ashley, Director, Office of Communications, OSHA, U.S. Department of Labor, Room N-3647, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-1999 or fax (202) 693-1634.

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II. Background

A. Personal Protective Equipment (PPE)

The use of personal protective equipment, including respirators, is often necessary to protect employees from injury or illness caused by exposure to toxic substances and other workplace hazards. Many OSHA standards in Parts 1910 through 1926 require employers to provide PPE to their employees and ensure the use of PPE. Some general standards require the employer to provide appropriate PPE wherever necessary to protect employees from hazards. *See, e.g.*, §§ 1910.132(a); 1915.152(a); 1926.95(a). Other standards require the employer to